IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-264

EDWARD JOSEPH WEDELSTEDT,
Petitioner,

vs.

STATE OF IOWA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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TABLE OF CONTENTS

CONSTITUTION AND STATUTES

CASE CITATIONS

CASE CITATIONS — Continued

OTHER AUTHORITY

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Petitioner prays that a writ of certiorari issue to re..ew the judgment of the Supreme Court of Iowa entered March 22, 1978, on which rehearing was denied May 17, 1978.

CITATION TO OPINON BELOW

This Petition seeks review of the Iowa Supreme Court decision in the case of *State of Iowa* v. *Wedelstedt*, 263 NW2d 894 (Iowa 1978), printed herein as Appendix A. Rehearing was denied in an opinion reported as *State of Iowa* v. *Wedelstedt*, 265 NW2d 626 (Iowa 1978) printed herein as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Iowa was entered on March 22, 1978, and the Court subsequently denied Petitioner's request for rehearing on May 17, 1978. Jurisdiction to review this judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3). A sixty day stay of the remand was issued by the Iowa Supreme Court. Notice of this stay is printed herein as Appendix C. This stay was subsequently extended for an additional period of thirty days. Notice of this extension is printed herein as Appendix D.

QUESTION PRESENTED

Was take back entrapment established as a matter of law so that the submission of charges against Petitioner to a jury and the affirmance of Petitioner's conviction denied him due process of law as guaranteed to him by the Fourteenth Amendment?

CONSTITUTIONAL PROVISONS INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

§1. Citizenship defined — privileges of citizens — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Petitioner was charged with, and convicted by an Iowa jury, of having violated two provisions of the Iowa Criminal Code: aiding in concealing stolen goods in violation of Iowa Code, 1973, §712.1 and of conspiracy to conceal stolen goods in violation of Iowa Code, 1973, §719.1. The jury rendered its finding of guilt on February 10, 1976. After several post-trial motions were denied, the trial court sentenced Petitioner to consecutive terms in prison of five years on the substantive charge and three years on the conspiracy count. These convictions were upheld by the Iowa Supreme Court in the opinions which serve as bases for this Petition.

At trial, the substantial proof against Petitioner, and the evidence which serves as a foundation for Petitioner's claims herein, was provided by a police informer, Thomas Meade, who had been granted immunity from prosecution in return for his testimony. The essence of Meade's testimony is recited in the Iowa Supreme Court opinion reprinted in Appendix A. While this opinion, for the most part, accurately recites Meade's testimony, certain details on which the Iowa Supreme Court relied were not supported by the record. This lack of support constitutes the error complained of and delineated below.

At trial, Meade testified that, in September of 1974, he stole a valuable collection of classic movie films and trans-

ported the stolen property to Cedar Rapids, Iowa, where he gave it to Petitioner. The following month, criminal charges were filed against Meade by the State of Iowa for acts unrelated to the theft of the films. Motivated by desire to avoid imprisonment, Meade contacted an agent of the Iowa Bureau of Criminal Investigation (BCI) in an attempt to secure immunity from the criminal charges pending against him. In return for immunity from all crimes committed by him short of murder and perjury, Meade agreed to work with the BCI to furnish evidence of crimes committed by Petitioner.

During the time that Meade worked with the BCI, he wore a transmitter to record conversations with Petitioner. Several recorded telephone conversations between Meade and Petitioner were received in evidence at Petitioner's trial.

The testimony critical to the instant Petition concerned events occurring between December 12 and December 15, 1974. During this time, Petitioner was in Las Vegas, Nevada, and Meade was in Iowa. This testimony related to an attempt by Petitioner and Meade to sell the stolen films to a purchaser who had been created by the BCI. At trial, the direct testimony of these events consisted of the playing of numerous recordings of telephone conversations between Petitioner and Meade (Transcript pp. 132-161). After several of these conversations, on December 15, 1974, Meade took a truck which had been given to him by the BCI and drove it to Petitioner's farm (Tr., p. 168, Appendix E, p. 21). The stolen film was loaded on this truck, at which time Meade took sole possession of the truck and the films and drove to a rendezvous with BCI agents (Tr., p. 169, Appendix E, p. 22). Meade then arranged for a meeting between the prospective purchaser and an employee of Petitioner named Gentry. When Gentry and another employee brought these films to the "purchaser", they were arrested. Petitioner's arrest occurred later.

The most critical testimony concerned whether Meade had sole possession of the stolen films, whether Petitioner gave Meade the location of the films and whether he instructed Meade to dispose of them on December 15. This testimony was elicited on cross-examination and is contained in Appendix E. In this testimony, Meade stated that, between December 13 and December 15, he conducted several telephone conversations with Petitioner who was in Las Vegas. Meade stated that he did not know the location of the films until he was told to get them by Petitioner and by a Mr. Karr (Tr., p. 196, Appendix E, p. 24). Meade stated that this instruction by Petitioner was contained on one of the tapes admitted into evidence (Tr., pp. 196-197, Appendix E, pp. 24-26). Meade also stated that he learned of the whereabouts of the films not from Petitioner but from Mr. Karr (Tr., p. 197, Appendix E, p. 25).

Meade testified that he was acting, during this time, pursuant to the instructions of BCI agents (Tr., pp. 197-199, Appendix E, pp. 25-29). Further, after having obtained these films, Meade had them in his sole possession without the knowledge of Petitioner (Tr., p. 201, Appendix E, p. 30) and ultimately consigned them to the custody of the BCI (Tr., p. 198, Appendix E, p. 26).

Meade based his contention that Petitioner had directed him to pick up the stolen films on a telephone conversation which occurred on December 15, 1974, and which

was admitted as Exhibit H at trial. This transcript is printed in relevant part as Appendix F.

At the close of the prosecution's case, Petitioner moved to dismiss both counts against him based on a claim that the state's evidence disclosed as a matter of law that, based on the Iowa doctrine of "take back" entrapment, Defendant had been entrapped into the commission of both of the charged offenses. (Appendix G). This motion was renewed at the close of all proof and was denied by the Court (Appendix H).

On appeal, Petitioner renewed his claim that the trial court erred by refusing to rule that, as a matter of law, Petitioner had been entrapped. The Iowa Supreme Court, in upholding Petitioner's conviction, rejected Petitioner's "take back" entrapment claim. *State of Iowa* v. *Wedelstedt*, 263 NW2d 894 (Iowa 1978), rehearing denied 265 NW2d 626. This rejection serves as the basis for the instant Petition.

REASONS FOR GRANTING THE WRIT

PETITIONER'S CONVICTION, IN THE ABSENCE OF ANY EVIDENCE NEGATING ENTRAPMENT AS A MATTER OF LAW, VIOLATES HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

Throughout the course of the proceedings against him, Petitioner has maintained that the evidence against him established entrapment as a matter of law. This claim was founded on the principle of "take back" entrapment enunciated by the Iowa Supreme Court in *State* v. *Overmann*, 220 NW2d 914 (Iowa 1974). Citing a line of cases propounded by the Fifth Circuit Court of Appeals, the *Overmann* Court held that:

> If an accused produces evidence disclosing (1) the government, through an agent or informer, supplied drugs to defendant, and (2) the government, through an agent or informer, later reappropriates any of those drugs from the accused, then a "take-back entrapment" is shown. Under those circumstances the State must come forth with evidence which contradicts either of the above two elements. *In event the State fails to so do then an accused is entitled to dismissal as a matter of law.* If, however, the State does produce evidence sufficient to create a fact issue as to a "take-back entrapment" the case should be accordingly submitted to the jury. See *United States* v. *Oquendo*, 490 F.2d at 164; *United States* v. *Bueno*, 447 F.2d at 906.
>
> 220 NW2d at 917 (Emphasis supplied).

Petitioner asserted that the State's own evidence established that Meade supplied the stolen films to Petitioner's accomplice, Gentry, reappropriated them on December 15 and then returned them to Petitioner's employees. After Meade returned the films, the BCI set up a "purchase" and arrested Petitioners after his employees, Gentry and Leone, attempted to complete the transaction. The State responded to this argument by claiming that "Meade's capacity as a BCI informer at the same time he, as defendant's agent, executed defendant's instructions, does not import the State had possession of the films." 263 NW2d at 900.

In adjudicating this issue the Iowa Supreme Court stated:

> The key question is Meade's capacity when he took the films from defendant's farmhouse to the Cedar Rapids motel to await Gentry and Leone as they flew in from St. Louis. Did Meade then have possession of the films as a BCI agent or did he have possession as defendant's agent? *Id.*

The Court answered this question as follows:

> On the record we believe Meade was acting under consistent instructions both from defendant and from the BCI. Under the circumstances a factual issue was generated. The jury was clearly entitled to find the government never came into possession of the goods at the critical time as a result of Meade's involvement. It was in no way prejudicial to defendant to submit the question to the jury. *Id.* at 900-901.

The Court's holding that Meade, in taking possession of the films, was acting pursuant to instructions from both Petitioner and the BCI was founded on its factual determination that:

> On December 15, 1974, defendant, from Las Vegas, told Meade to go to defendant's farm outside Cedar Rapids where the films were located. *Id.* at 897.

Petitioner, in seeking a rehearing, challenged the factual basis for this finding. Petitioner argued that the record failed to support such a finding and asked the Court to specify the portion of the record supporting the challenged finding of fact. In response, the Court stated:

> In view of the agency relationship existing between defendant and Meade the finding complained of is perhaps of not controlling importance. In any event the evidence, taken in the light most favorable to the verdict, discloses the jury could have made such a finding. It is elementary the jury is at liberty to take and reject from the testimony of various witnesses as it chooses.
>
> Defendant testified that he 'got' the location of the films when both a Mr. Karr and defendant told him to go there. Meade testified his belief the tape recording of the phone conversation would disclose this. (Tr., pp. 196-197) Defendant cannot rely on the tapes to withdraw this testimony. The tapes were at parts inaudible. Moreover the jury could believe Meade was right in his testimony but wrong in his stated belief the conversation was recorded on the tape. 265 NW2d at 627.

It is Petitioner's contention that, in these opinions, the Iowa Supreme Court created an issue of fact where none existed in the record. Because the evidence presented by the State established entrapment as a matter of law and because no evidence was presented to refute this entrapment, Petitioner's conviction violated his due process rights as guaranteed to him by the Fourteenth Amendment to the United States Constitution. The question of entrapment should never have been submitted to the jury. That jury's finding of guilt belies the Iowa Supreme Court's gratuitous contention that "it was in no way prejudicial to defendant to submit the question to the jury." 263 NW2d at 901.

The decision of the Iowa Supreme Court violates pre-

cepts established by this Court in two lines of cases. *Sorrells* v. *United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) represents the seminal case in the first line of relevant authority. In *Sorrells*, this Court first recognized and sustained the validity of the entrapment defense. In exploring the foundation of this defense, the *Sorrells* Court created the so-called "subjective-objective" dichotomy. The majority opted for a subjective approach, one which focuses on the conduct and propensities of each defendant so that only the "unwary innocent" will be protected. The objective approach promoted by the *Sorrells* concurrence disregards a defendant's intent and focuses on the nature of police conduct. Pursuant to the objective approach, no matter what a defendant's record or criminal animus, courts should not countenance certain police conduct whose existence is deemed detrimental to society.

Both tests for entrapment may prompt a trial court to find entrapment as a matter of law. However, this limitation on the role of a jury is greater where the objective test is utilized than where the subjective test, which involves factual questions concerning a defendant's mental state, is used. A ruling under the objective test, as Mr. Justice Roberts urged in the *Sorrells* case, being aimed at blocking off areas of impermissible police conduct, is consigned to the court and not the jury:

> The protection of its own functions and the preservation of the purity of its own temple belongs to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.
>
> 287 U.S. at 457 (separate opinion).

This critical role entrusted to trial and appellate courts under the objective entrapment test is important and controlling herein because the Iowa Supreme Court, in *State* v. *Mullen*, 216 NW2d 375 (Iowa 1974) adopted that test as the law of Iowa.

While this Court is generally loath to interfere with a state court's enforcement of its own doctrines, its opinions have also demonstrated an alacrity in assuring that such doctrines are enforced in a manner which does not violate due process of law. See, e.g. *Raley* v. *Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). This is especially so in those cases in which this Court has reversed state court convictions which it found to be unsupported by the trial court record. In *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), the initial decision in this second line of relevant precedent, this Court held that a conviction on charges "totally devoid of evidentiary support" constitutes a violation of the Fourteenth Amendment Due Process Clause. The *Thompson* Court required that all elements of a charged offense be supported by the evidence. *Id.* at 204. Later, this Court made it manifest that:

> It is beyond question, of course, that a conviction based on a record lacking *any relevant evidence as to a crucial element* of the offense charged would violate due process. *Vachon* v. *New Hampshire*, 414 U.S. 478, 480, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) quoting

> *Harris* v. *United States*, 404 U.S. 1232, 1233, 92 S.Ct. 10, 30 L.Ed. 425 (1971) (Opinion in Chambers) (emphasis supplied).

Accord, *Johnson* v. *Florida*, 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968). See generally, Comment Note — *Lack of Evidence Supporting State Conviction of Criminal Offense as Violation of Federal Due Process.* 15 L.Ed.2d 889 (1965).

These two lines of authority coalesce in the instant case to require the granting of this Petition. As is readily apparent from the decisions of the Iowa Supreme Court, Petitioner's conviction rested entirely on a finding that the evidence presented a factual question as to Meade's role in taking possession of the stolen films and redelivering them to Petitioner's employees. If the record demonstrates that Meade was under the sole control of the BCI, take back entrapment was established as a matter of law. If, as the Iowa Supreme Court held, the record presents a question of fact as to whether Meade was acting pursuant to concurrent instructions by Petitioner and by the BCI, the charges against Petitioner were properly submitted to the jury.

Initially, the believability and logic of the Iowa Supreme Court's statement that "Meade was acting under consistent instructions both from defendant and from the BCI" is suspect on its face. At every step in the disposition of the films, Meade was acting as a BCI puppet. The record manifests Meade's constant contact with and instructions from the BCI. The BCI provided him with a truck onto which he was to load the films (Tr., p. 196, Appendix E, p. 24). Meade took samples of the films to the BCI before

taking sole possession of them (Tr., p. 197, Appendix E, p. 25). The BCI told Meade where to park the truck after he had obtained the films and watched the truck while Meade conferred with BCI agents (Tr., p. 198, Appendix E, p. 26). As such, *the BCI itself took possession of the* films, exclusive of *Meade's activity.* BCI agents directed Meade to call Petitioner and direct him to a specific rendezvous point (Tr., pp. 199-200, Appendix E, pp. 27-30). At this time, Petitioner had no knowledge of the films' location (Tr., p. 201, Appendix E, p. 30).

It cannot be seriously argued that, if Petitioner had given Meade instructions contrary to those given by the BCI, Meade would have obeyed Petitioner. This concept of dual agency was rejected by this Court in *Sherman* v. *United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). There, the Government contended that it should not be bound by the actions of an informant, Kalchinian, who had undertaken to entrap Defendant. This Court, in firmly rejecting this characterization, stated:

> *The Government cannot disown Kalchinian and insist it is not responsible for his actions.* Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced.
>
> * * *
>
> In his testimony the federal agent in charge of the case admitted that he never bothered to question

> Kalchinian about the way he had made contact with petitioner. *The Government cannot make such use of an informer and then claim disassociation through ignorance.* 356 U.S. at 373-375 (Emphasis supplied) (footnote omitted).

Just as in *Sherman*, the government agent in the instant case was operating under the threat of criminal charges. The fact that Meade, unlike the *Sherman* informer, was operating pursuant to explicit police instructions makes this Petition a more compelling matter than that on which this Court predicated its reversal in *Sherman*. Even absent such precedent, common sense dictates a rejection of any theory making Meade an agent for both the BCI and for Petitioner. The record makes manifest his true allegiance. Such a creative doctrine cannot provide critical evidence which is not present in the record.

Even accepting, arguendo, the Court's dual agency theory, a review of the record further discloses that the critical fact on which the Iowa Supreme Court relied — Petitioner's order that Meade pick up the films — is, indeed, missing from the record. In an involved record of a four-day trial, the Iowa Supreme Court could cite only one sentence to create a question of fact for the jury. The passage on which the Court below relied was a statement by Meade, made not on direct but on cross-examination, one immediately contradicted by him and one impeached by the very tape recording on which it relied. On direct examination, Meade never claimed that Petitioner had ordered him to pick up the films. Instead, the State relied entirely on transcripts of telephone conversations between Petitioner and Meade. Nowhere in these transcripts was any such order contained.

Later, on cross-examination, Meade stated:

Q. Well, how did you happen to get to that location of the films? Did somebody tell you to go there?

A. Yes, Mr. Karr did and Mr. Wedelstedt.

Q. *And did Mr. Wedelstedt tell you that on the tapes?*

A. *I believe so.* I told him that I was going out there. I told him I had the truck and I was taking it out there to meet with him, so we did discuss it on the tapes.

(Tr., pp. 196-197, Appendix E, p. 25)
(Emphasis supplied).

Immediately thereafter, Meade contradicted himself:

Q. And at least from the night you told him you were going to, Mr. Wedelstedt never told you where the tapes were at?

A. Where the films were?

Q. You learned this from Mr. Karr?

A. Yes.

Q. You learned that on Saturday night?

A. *I learned it on Sunday morning.* Saturday night, Mr. Karr said, 'Meet me out there.' I didn't know where the films were.

(Tr., p. 197, Appendix E, p. 25)
(Emphasis supplied).

The transcript which Meade believed corroborated his testimony and on which the State relied on direct examination was introduced as Exhibit H and is reprinted, in relevant part, as Appendix F. Not only does this tape of their Sunday morning conversation not support Meade's claim, but it contradicts his testimony:

> Meade: My feelings — why should I tell the guy to forget the deal? I know, you know, the guy's here with the money *and I got the film.*
>
> Defendant: *You don't know where that films at.*
>
> Meade: Huh? *Who don't know where it's at? I've got it all.* You better call Dale and check.
>
> (Appendix F, pp. 33-34)
> (Emphasis supplied).

This transcript bespeaks only one reading. Petitioner believed that Meade did not know the location of the stolen films. Meade informed Petitioner that he (Meade) not only knew the location but actually had the films in his possession. It strains credulity to believe that Petitioner would order Meade to pick up films which Meade already had in his possession.

The Iowa Supreme Court, in assessing this evidence stated:

> Defendant testified that he 'got' the location of the films when both a Mr. Karr and defendant told him to go there. Meade testified his belief the tape recording of the phone conversation would disclose this (Tr., pp. 196-197). Defendant cannot rely on the tapes to withdraw this testimony. The tapes were at parts inaudible. Moreover the jury could believe Meade was right in his testimony but wrong in his stated belief the conversation was recorded on the tape. 265 NW2d at 627.

This holding ignores the clear record and constitutes an abandonment of the Court's duty under an objective entrapment test. The State produced the transcripts and, as such, vouched for their validity. These transcripts were introduced as a recording of the complete conversation between Meade and Petitioner. Further, the inaudible portions occur in sections unrelated to a discussion of moving the films.

Moreover, allowing a jury to believe that such inaudible portions might support Meade's testimony violates principles of law and of logic. The audible portions clearly demonstrated that, at a time when Petitioner was supposed to have ordered Meade to pick up the films, Meade already had possession of them without Petitioner's knowledge. Allowing a jury to use the inaudible portions to corroborate Meade's testimony violates the presumption of innocence accorded Petitioner, as well as the presumptions of caution with which Iowa jurors are required to treat accomplice and informer testimony. See Iowa Code, 1973, §782.5, *State* v. *Anderson*, 38 NW2d 662 (Iowa 1949).

Although this Court will not upset a state court determination where some evidence is present to support it, two cases demonstrate that, where such evidence is inherently incredible, this court will act to protect a Defendant from a due process violation.

In *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961), a defendant, in appealing his state court conviction for disturbing the peace, claimed that the conviction was unsupported by the evidence and, therefore, violated his due process rights under *Thompson* v. *Louisville, supra.* The appeal devolved into a question of whether any evidence existed to prove that Defendant had acted "in such a manner as to unreasonably disturb or alarm the public." One witness, the manager of the store in which Defendant had staged a protest, had testified that he had called police because he feared such a disturbance. 368 U.S. at 171.

Despite this Court's claim that it will not test the sufficiency of evidence in a state court proceeding, *Thompson* v. *Louisville, supra,* at 191, the *Garner* court totally rejected this testimony as "completely unsubstantiated by the record." 368 U.S. at 171. Having detailed the other evidence which impeached the manager's testimony, the court held:

> Under these circumstances, the manager's general statement gives no support for the convictions within the meaning of *Thompson* v. *Louisville* (US) supra. *Id.* at 172.

Similarly, in *Sherman* v. *United States, supra,* this Court held that the question of entrapment should not have been submitted to the jury despite the Government's claim that the jury could have interpreted Defendant's caution not as the absence of predisposition to commit the crime but "as the natural wariness of the criminal." 356 U.S. at 375. *Cf. Masciale* v. *United States*, 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed2d 859 (1958). Thus, where, as here, the record discloses limited, unsubstantiated evidence which a state

court has used to create a jury question, this Court will act to vouchsafe a state defendant's due process rights and review that record.

It must be granted that an entrapment claim based on a state law doctrine presents many reasons for this Court's refusal to intervene. Certainly, the record reveals that Petitioner is not an unwary innocent or a civil rights protestor. The record manifests his illegal motives. Nonetheless, where state courts establish a legal doctrine, they must enforce such a precept uniformly without regard to whether that person who asserts it is "good" or "bad."

Here, the Iowa Supreme Court, in thoroughly-reasoned decisions, adopted the objective test for entrapment and embraced the doctrine of "take back" entrapment. It then found an unpopular defendant attempting to utilize these theories. Rather than uniformly applying the law to this Petitioner, the court below sought, and found, gossamer evidence in the record to uphold his conviction. Petitioner now asks that this Court, as it did in *Garner* and *Sherman*, review these rulings and guarantee him due process and uniform enforcement of the law under the Fourteenth Amendment.

CONCLUSION

For the reasons detailed above, Petitioner respectfully requests that, pursuant to this Court's supervisory power, this Petition be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF IOWA

THE STATE OF IOWA,
Appellee

v.

EDWARD JOSEPH WEDELSTEDT,
Appellant

FILED
March 22, 1978
No. 34 - 60762

Appeal from Black Hawk District Court — Roger Peterson, Judge.

Defendant appeals convictions of aiding in concealing stolen goods and conspiracy.—Affirmed.

C. A. Frerichs, of Fulton, Frerichs, Nutting & Martin, of Waterloo, for appellant.

Richard C. Turner, Attorney General, Thomas A. Evans, Jr., Assistant Attorney General, and David H. Correll, County Attorney, for appellee.

Considered by Reynoldson, Acting Chief Justice, and LeGrand, Rees, Harris, and McCormick, JJ.

HARRIS, J.

Defendant appeals his convictions of aiding in concealing stolen goods in violation of § 712.1, The Code, 1973, and of conspiracy in violation of § 719.1, The Code, 1973. We affirm the trial court.

A central figure in the State's case was Thomas Meade. The record shows that, in 1967, Meade was incarcerated upon conviction of a felony. After his release he went to college and then to work for Edward Joseph Wedelstedt (defendant). Defendant was shown to own a chain of what were characterized as bookstores. Meade found locations and opened new bookstores for defendant.

In 1974, while in Davenport visiting his parents, Meade met some people who had stolen two movie projectors. He thereafter called defendant at his office in Cedar Rapids, Linn County, Iowa, to inquire whether defendant wanted

to buy the stolen projectors. Defendant agreed to purchase the projectors for $200. After the purchase was made Meade told defendant the people who stole the projectors also saw several canisters of film located at the farmhouse where the projectors were stolen. Believing the films were pornographic and thus useful in his business, defendant sent Meade back to investigate the films. Meade went to the Davenport farmhouse, stole a few canisters, and took them to his sister's farm near Davenport. The following day Meade met defendant at a truckstop and showed the stolen samples. Although the films were not pornographic, defendant was interested in buying them.

The day following this meeting Meade drove his station wagon back to the farmhouse and loaded it by stealing more film. Because there were so many films Meade went back the next day with a rented truck and with help. The truck was loaded with films and various furniture. The truck was then driven to Meade's home in Solon, Iowa, where the stolen furniture was unloaded. Thereafter Meade's wife drove the station wagon to defendant's warehouse in Cedar Rapids. Defendant and his helper followed in the truck.

Defendant paid $10,000 for films, $2500 in cash and $7500 in credit on a mortgage defendant held on Meade's house in Solon.

Defendant then gave Meade $200 and directed him to rent a trailer and to buy foot lockers so the films could be taken from the truck and hauled to another place for storage. Meade did so and thereafter drove the trailer to defendant's home in Cedar Rapids and left it there so that someone else could move the films for storage at a place unknown to Meade.

In October of 1974 the State filed criminal charges against Meade in an unrelated matter. Motivated by desire to escape punishment in that matter Meade entered into an agreement with the State. Meade received limited immunity in exchange for his furnishing evidence against defendant. From this point Meade worked in a dual capacity. Defendant believed Meade remained his agent and was acting in his behalf. At the same time Meade worked with the Iowa bureau of criminal investigation (BCI). He wore a transmitter to record conversations with defendant. Several recorded telephone conversations between Meade and defendant were received in evidence. One such conversation had to do with a book found by Meade and later given defendant which listed all the films. Another conversation concerned finding a more permanent storage place for the films. Other conversations dealt with finding someone who would buy the stolen films.

At the direction of the BCI Meade told defendant that a prospective buyer from Los Angeles had been found for the films. This was done at defendant's office in Cedar Rapids on November 7, 1974.

By December 12, 1974, after several other conversations, principally in Cedar Rapids, defendant told Meade of another potential buyer named Erlich. As it turned out Erlich did not want the films. Meade reported all this to the BCI. Fearing defendant might sell the films to some other buyer the BCI decided to arrange an offer to purchase the films.

On December 12, 1974, defendant took a plane to Las Vegas, Nevada. Meade called defendant there and told him he wanted the $7500 in cash because he had not received credit on his house mortgage. In the course of this conversation defendant told Meade that, if Meade would sell the films for him, he (defendant) would split the profits 50-50. Defendant told Meade he would hire a man named Bruce Gentry to transport the films. Meade made several other phone calls to defendant at Las Vegas in an attempt to hurry up the sale because Meade and the BCI still did not know where the films were.

On December 14, 1974, Meade again called defendant in Las Vegas to report he had a truck ready to transport the films. In reality the rented truck had been supplied by the BCI. On December 15, 1974 defendant, from Las Vegas, told Meade to go to defendant's farm outside Cedar Rapids where the films were located. Meade found there were other employees at the farm. From them Meade borrowed a van and, by prearrangement with the BCI, took samples of the films to a Cedar Rapids motel where they were shown to the BCI agents. Meade did this while defendant's other employees loaded the truck which Meade had brought with him.

Meade then drove the truck and parked it at a truck dealership across from the Cedar Rapids motel. Later that day Meade and a Mr. Lavin (another of defendant's employees) went to the airport to pick up Bruce Gentry and Dennis Leone who had flown in from St. Louis to transport the films.

Later the same evening Meade, Gentry, and Leone went to meet defendant who had just flown in from Las Vegas. They met him at defendant's home in Cedar Rapids where arrangements were made to transport the films to a Cedar Falls motel where the BCI had arranged for the purchase. Cedar Falls is in Black Hawk County. Gentry and Leone were to drive the truck and would be paid $5000 each for

their services. Meade would drive in a lead car. Defendant gave the following additional instructions as to the actual transfer of the films:

The films were to be shown and half the money was to be exchanged first. If there were any "double cross" defendant instructed them to start shooting. Meade was armed with a .22 automatic. Defendant was also to supply two guns for protection. Later all went to defendant's warehouse where he paid the men and got one gun (not two) which was given to Gentry. After leaving the warehouse all went to the phone booth across the street to call Paul Swangle at the motel in Cedar Falls. Swangle, a BCI agent, posed as a buyer from Los Angeles. Defendant, not knowing his real identity, talked with Swangle and agreed on a selling price of $50,000.

After leaving defendant at his house in Cedar Rapids, Meade, Gentry, and Leone went back to the truck and left for Cedar Falls at approximately 1:00 a.m. When they arrived at Cedar Falls they went to a restaurant across from the designated motel and, at approximately 3:00 a.m., called Swangle at his motel room.

Meade then went into Swangle's room alone. At the BCI's request he called Gentry and Leone and told them to park the truck in front of room 127. Following the BCI's instructions, Meade told Gentry to instruct Leone to get out of the truck. At that point one person inside the motel room was to come out and look at the films. At the same time Meade would go inside with the other person. When all gathered for the transfer of money and films the BCI agents arrested Gentry and Leone. Defendant's arrest occurred later.

I. For his first assignment of error defendant states "the State failed to present evidence that defendant committed said crimes or any elements thereof in Black Hawk County."

The only events occurring in Black Hawk County were those described as having occurred in Cedar Falls. Defendant was not physically present in Black Hawk County at any material time. Prior to trial defendant objected to the place of trial[1] as provided in § 753.2, The Code: "Criminal actions shall be tried in the county in which the crime is committed, except as otherwise provided by law. All objections to place of trial are waived by a defendant unless he objects thereto prior to trial."

Defendant preserved his challenge to the place of trial by his pretrial motion, renewed at and after trial. Section 753.3, The Code, lists special provisions for places of trial, including cases where elements occur in two or more counties:

"If conduct or results which constitute elements of an offense occur in two or more counties, prosecution for the offense may be had in any of such counties. In such cases, where a dominant number of elements occur in one county, that county shall have the primary *right* to proceed with prosecution of the offender."

(Emphasis added.) § 753.3 (1).

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1. The place of trial requirements of § 753.2 (venue) are to be distinguished from questions of jurisdiction. The statewide claims for criminal jurisdiction in Iowa are outlined in § 753.1, The Code. See *State* v. *Wardenburg*, 261, Iowa 1395, 1400, 158 N.W.2d 147, 150 (1968).

A certain amount of confusion results when the statutory requirements for place of trial are compared with the proof requirements of place of offense. These related questions take on a different context under the last sentence of § 753.2 when there is no pretrial objection to place of trial. *State* v. *Donnelly*, 242 N.W.2d, 295, 297 (Iowa 1976).

Defendant's timely objection to venue in the instant case did preserve the question. But it is to be remembered that the question preserved was demoted in its importance by a legislative amendment effective July 1, 1973. In *Donnelly*, supra, 242 N.W.2d at 297 we pointed out:

"Two basic changes were made in 1973. *In the first sentence of section* 753.2 *language making venue a jurisdictional fact was replaced with language stating simply that 'Criminal actions shall be tried in the county in which the crime is committed.* * * *.' At the same time, a second sentence was added which waived 'all objections to place of trial' unless objected to prior to trial."
(Emphasis added.)

Accordingly, references in our earlier criminal cases relating to venue, and which describe venue as "jurisdictional", must be read in the light of the legislative mandate demoting the dimensions of the venue question. And it must be remembered that physical presence of an accused was not required for Iowa venue, even prior to the 1973 amendment.

It is unnecessary for us to decide what the effect of the 1973 amendment might be where no elements of an offense can be shown within the county where the crime is alleged. We believe defendant, acting through his agent, perpetrated elements of aiding in concealing stolen goods

in Black Hawk County. And we believe, under the same theory, the conspiracy was continued and renewed in Black Hawk County.

It must be conceded two factors tend to bolster defendant's position. Defendant acted in Black Hawk County, if at all, only through an agent. And it is to be remembered Meade's acts in Black Hawk County all occurred while he was serving in a dual capacity. However we believe these two factors, considered separately or together, do not destroy the State's case.

It is commonly held that a person is criminally responsible for acts which, as principal, he directs through his agents. We note and approve the following: "* * * The well-established theory of the law is that where one puts in force an agency for the commission of crime, he in legal contemplation accompanies the same to the point where it becomes effectual * * *." I Wharton's Criminal Procedure, § 18, pp. 55-56 (12th ed. 1974). See also 21 Am.Jur.2d, Criminal Law, § 386, pp. 405-406; 22 C.J.S., Criminal Law, § 134, pp. 356-357.

Defendant does not seriously dispute the rule which holds persons responsible for criminal acts perpetrated through their agents. But defendant argues no such rule could apply here because he believes any illegal acts were concluded in Linn County. He points to our rule that an overt act is not an element of the crime of conspiracy in Iowa. See *State* v. *Jennings*, 195 N.W.2d 351 (Iowa 1972). Defendant also argues that, because Meade acted for the BCI, he acted legally in Black Hawk County.

To consider these claims we turn first to the charge under § 712.1. We note "*** [t]o establish concealing of

stolen property the State need not prove actual hiding or secreting of the goods. It need only show defendant committed acts which rendered more difficult discovery or identification of the property by its owner (Authority)." *State* v. *Sheffey*, 234 N.W.2d 92, 96 (Iowa 1975). Defendant, acting through all those he sent into Black Hawk County, clearly made discovery or identification of the property more difficult.

Defendant's act was not changed by Meade's dual role. The basis for holding a principal accountable when he acts through an agent derives from the principal and not from the agent. The doings of the agent are attributable to the principal because the principal chooses to act through an agent. Defendant's purpose and conduct were unaffected either by any loyalty or by what defendant may now believe to be treachery by Meade.

The instant case is to be distinguished from those in which the owner of goods encourages, connives at, and participates in the inception of a crime. Under such circumstances questions arise as to the illegality of a taking. However where there already exists an illegal conspiracy it is not legitimatized by arranging for a delivery for the purpose of apprehending the guilty party. *Shaw* v. *People*, 72 Colo. 142, 209 P.2d 812, 812-813 (1922). See 15A C.J.S., Conspiracy, § 50, p. 779.

We agree a conspiracy was shown to have been perpetrated in Linn County. And it is true, under *Jennings*, supra, no overt act was a necessary element of that conspiracy. But it does not follow defendant could not be convicted in Black Hawk County on the basis of an overt act arising from the conspiracy. Once a conspiracy is entered into it continues until terminated. The burden is upon a

conspirator to show it has ended. *State* v. *Kidd*, 239 N.W.2d 860, 864 (Iowa 1976). Every act in furtherance of the conspiracy is considered a renewal or continuance of the unlawful agreement. The conspiracy continues so long as there are overt acts in furtherance of its purpose. 15A C.J.S., Conspiracy, § 35 (2), p. 724-726; 16 Am.Jur.2d, Conspiracy, § 29, p. 142.

We should also discuss the parties' dispute as to whether defendant's conviction may be affirmed on the theory he was an accessory rather than a principal. Defendant believes such a theory differs from the one under which he was convicted in district court. He points to *State* v. *Hochmuth*, 256 Iowa 442, 127 N.W.2d 658 (1964) which stands for the proposition the State is bound by its theory of prosecution under § 712.1, The Code. In *Hochmuth* we said § 712.1 defines one crime which may be committed three ways: (1) buying; (2) receiving; or (3) aiding in concealing stolen goods. The State is bound by whichever of the three ways it charges defendant under the section.

However this does not mean, as defendant argues, the State is precluded from asserting the defendant was an accessory, rather than a principal. We recently explained the effect of § 688.1, The Code, abrogating the distinction between principals and accessories, in *State* v. *Rydel*, 262 N.W.2d 598 (Iowa 1978). To have charged defendant as an accessory would have been surplusage under § 688.1. The State's right to consider defendant an accessory was in no way affected by failure to include language indicating defendant was an accessory rather than a principal.

Under the foregoing principles we hold defendant was not entitled to a dismissal of either count on the basis of the State's failure to prove venue in Black Hawk County.

II. In his second assignment of error defendant argues he was entitled to a dismissal of both counts on the basis of "take-back entrapment." We explained the legal defense of take-back entrapment in *State* v. *Overmann*, 220 N.W.2d 915, 917 (Iowa 1974);

"* * * [I]f an accused produces evidence disclosing (1) the government, through an agent or informer, supplied drugs to defendant, and (2) the government, through an agent or informer, later reappropriates any of those drugs from the accused, then a 'take-back entrapment' is shown. *Under those circumstances the State must come forth with evidence which contradicts either of the above two elements. In event the State fails to so do then an accused is entitled to a dismissal as a matter of law.* If, however, the State does produce evidence sufficient to create a fact issue as to a 'take-back entrapment' the case should be accordingly submitted to the jury. (Authorities)." (Emphasis added.)

Under this theory defendant argues the State, through its agent (Meade), supplied the alleged stolen property to defendant, through defendant's accomplice (Gentry), for the explicit purpose of the State later taking back the property in order to prosecute defendant in Black Hawk County. The trial court rejected defendant's argument and submitted the question of take-back entrapment as a factual issue to the jury. Defendant's challenge is to the appropriateness, not the form, of the trial court's instruction on the subject.

In denying defendant's motion to dismiss the trial court pointed to defendant's possession of the films from prior to the time Meade became a BCI informer. Defendant argues the trial court in effect carved out a new exception

to the take-back entrapment rule. Defendant argues: "Under the trial court's ruling, a jury would have the discretion to apply or not the defense of 'take-back entrapment' if the State's original possession of the contraband as preceded in time by possession by defendant." For reasons we shall attempt to explain, we disagree with defendant's understanding of the basis for the trial court's ruling.

The State points out defendant had possession of the films from the time he acquired them and kept either actual or constructive possession until they were delivered for sale. The State does not believe the films were supplied by the State to defendant as a result of Meade's driving the rented truck to defendant's farm, at defendant's instructions, to get the films. The State argues Meade's capacity as a BCI informer at the same time he, as defendant's agent, executed defendant's instructions does not import the State had possession of the films. Rather it merely denotes the police were keeping a close watch on defendant's conduct and were allowing him to consummate his plan of sale. The State believes its involvement was limited to setting up the sale of stolen goods to a government agent. The State relies on *United States* v. *Chisum*, 312 F.Supp. 1307 (D.C. Cal. 1970) and *United States* v. *Mahoney*, 355 F.Supp. 418 (D.C. La. 1973). On this basis the State concludes take-back entrapment did not exist as a matter of law.

The key question is Meade's capacity when he took the films from defendant's farmhouse to the Cedar Rapids motel to await Gentry and Leone as they flew in from St. Louis. Did Meade then have possession of the films as a BCI agent or did he have possession as defendant's agent?

On this record we believe Meade was acting under

consistent instructions both from defendant and from the BCI.

Under the circumstances a factual issue was generated. The jury was clearly entitled to find the government never came into possession of the goods at the critical time as a result of Meade's involvement. It was in no way prejudicial to defendant to submit the question to the jury. We need not consider whether it would have been error to hold as a matter of law that there was no take-back entrapment. It is enough for us to hold defendant's contention he was entitled to a dismissal on the basis of take-back entrapment is without merit.

As both defendant's assignments are without merit the judgement of the trial court is affirmed.

AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF IOWA

THE STATE OF IOWA,
Appellee

v.

EDWARD JOSEPH WEDELSTEDT,
Appellant

ORDER ON PETITION FOR REHEARING

MOORE, Chief Justice

Defendant's petition for rehearing complains principally of a factual notation in our opinion: "On December 15, 1974 defendant from Las Vegas, told Meade to go to defendant's farm outside Cedar Rapids where the films were located." Defendant argues the record does not support such a finding.

In view of the agency relationship existing between defendant and Meade the finding complained of is perhaps of not controlling importance. In any event the evidence, taken in the light most favorable to the verdict, discloses the jury could have made such a finding. It is elementary the jury is at liberty to take and reject from the testimony of various witnesses as it chooses.

Defendant testified that he "got" the location of the films when both a Mr. Karr and defendant told him to go there. Meade testified his belief the tape recording of the phone conversation would disclose this. (Transcript, pp.

196-197) Defendant cannot rely on the tapes to withdraw this testimony. The tapes were at parts inaudible. Moreover the jury could believe Meade was right in his testimony but wrong in his stated belief the conversation was recorded on the tape.

In division II defendant asks that we redraft our opinion to reflect what testimony or evidence we rely upon for our finding of facts. In division III defendant again asserts his belief a theory could not be considered because it is at variance with the position taken by the prosecution in trial court. This was a contention we considered and rejected on the submission of the appeal.

We have carefully considered each division of defendant's petition for rehearing. The petition is denied and overruled.

APPENDIX C

IN THE SUPREME COURT
FOR THE STATE OF IOWA

THE STATE OF IOWA,
Plaintiff-Appellee, No. 34 - 60762

vs.

STAY ORDER

EDWARD JOSEPH WEDELSTEDT,
Defendant-Appellant.

The Court, having been duly advised in the premises and having considered Motions filed by Appellant herein, ORDERS AS FOLLOWS:

1. That Appellant's Motion for a Stay of Remand Pending Appeal to the United States Supreme Court is granted for a period of sixty days to enable Appellant to perfect said appeal.

2. Should said appeal be perfected, a Stay should be in full force and effect until a final decision is rendered by the United States Supreme Court.

SIGNED this 17th day of May, 1978.

C. EDWIN MOORE
SUPREME COURT JUSTICE

APPENDIX D

IN THE SUPREME COURT
FOR THE STATE OF IOWA

THE STATE OF IOWA,
Plaintiff-Appellee, No. 34 - 60762

vs.

STAY ORDER

EDWARD JOSEPH WEDELSTEDT,
Defendant-Appellant.

The Court, having been duly advised in the premises and having considered the Motion filed by Appellant herein, ORDERS AS FOLLOWS:

1. That Appellant's Motion for an Extension of Time is granted for an additional period of thirty (30) days to enable Appellant to perfect said appeal.

2. Should said appeal be perfected, a Stay should be in full force and effect until a final decision is rendered by the United States Supreme Court.

SIGNED this 12th day of July, 1978.

C. EDWIN MOORE
SUPREME COURT JUSTICE

APPENDIX E

Partial transcript of the testimony of Thomas Meade at trial with emphasis added.

(T. p. 168)

and I waited there while Mr. Hendermeister and Mr. Lavin unloaded the film onto the U-Haul truck. And when I returned to the farm, it was loaded, and I then took the truck, drove it to the Ramada. I parked it across the street in a truck dealership.

Q. Were these film canisters or samples that you took from the farm, were they examined by yourself?

A. Yes.

Q. And did they contain any names of any individuals on the —

A. I don't think they did. And after I got the truck back, they asked me to go to the truck and bring a sample over with Mr. Shepard's name on it. So I went back to the truck and brought two more canisters over that had his name on it.

Q. Now, can you tell us how you got to the farm on that morning?

A. I drove the U-Haul truck out there. While they were loading it, I borrowed one of the employee's vans. I drove back to the Ramada, and then returned to the farm and drove the truck back.

Q. And how did you get — how did you get that U-Haul?

A. I picked it up at the Ramada. One of the agents rented it, I think.

Q. Would you describe that vehicle for us? The U-Haul that you picked up at the Ramada and drove to the farm.

(T. p. 169)

A. Well, it was approximately an 18 or 20-foot van-type truck.

Q. And how did you get from the farm to the Ramada?

A. I drove the van that one of the employees had, to take the samples over, and then I returned and drove the rented U-Haul truck with the film back.

Q. Did you pick up the truck with the film loaded in it, Mr. Meade?

A. Yes.

Q. And about what time was that?

A. Approximately 12 Noon.

Q. And that film was loaded in the truck you have just described?

A. Yes.

Q. Once you had the film loaded, where did you go?

A. To the Ramada.

Q. And did you make contact with any members of the BCI at that time?

A. Yes.

Q. And who was that you made contact with?

A. With Agent Marlin.

Q. Is this the same gentleman that you testified about previously?

A. Yes.

* * *

(T. p. 195)

A. Yes.

Q. And it was that Friday, Saturday and Sunday when you had several telephone conversations with him, isn't that true?

A. Yes.

Q. And all those conversations had been recorded and all those conversations have been played to the Jury, is that not true?

A. Yes.

Q. *Now, on Sunday morning, at about* 9:00, *you went out with a truck to Mr. Wedelstedt's farm for the purpose*

(T. p. 196)

of having the films loaded thereon, isn't that correct?

A. *Yes.*

Q. *And you received this truck from a BCI agent?*

A. Yes.

Q. And do you remember which agent that was?

A. No. The truck was parked in the lot and I didn't receive — no one handed me the keys; the keys were in the — someone told me — the truck out there.

Q. And that "someone" was an agent of the State of Iowa?

A. Yes.

Q. And had they told you prior to that time, before that time, that they would have a truck available for you that morning when you came out?

A. Yes.

Q. And when did they tell you that?

A. The day before, I believe.

Q. It was the day before on Saturday when you first found out where the films were at?

A. No, I didn't found out where the films were at until

I got there and actually saw Mr. Karr uncovering them.

Q. Well, how did you happen to get to that location of the films? Did somebody tell you to go there?

A. Yes. Mr. Karr did and Mr. Wedelstedt.

Q. And did Mr. Wedelstedt tell you that on the tapes?

A. I believe so. I told him that I was going out

(T. p. 197)

there. I told him I had the truck and I was taking it out there to meet with him, so we did discuss it on the tapes.

Q. *And at least from the night you told him you were going to, Mr. Wedelstedt never told you where the tapes were at?*

A. *Where the films were?*

Q. *You learned this from Mr. Karr?*

A. *Yes.*

Q. *You learned that on Saturday night?*

A. *I learned it on Sunday morning. Saturday night, Mr. Karr said, "Meet me out there." I didn't know where the films were.*

Q. So Sunday morning you went out with the truck and had them load it and you now acknowledge you then knew where the films were at, because they, they were in the truck that you had brought out?

A. Yes.

Q. And at that time, you then took several samples back to the BCI people, leaving these people to continue to load the truck?

A. Yes.

Q. *And some time thereafter, later in the morning, you came back and got the truck and took that down then to where the BCI agents were?*

A. *Yes.*

(T. p. 198)

Q. *And did they advise you where to park the truck?*

A. *Yes.*

Q. *Was this right across the street from the Ramada Inn?*

A. *Yes.*

Q. *Was there surveillance of that truck at that time?*

A. *Yes.*

Q. *Somebody watched the truck from then on in?*

A. *Yes.*

Q. *Did you then walk back across to the rooms where the BCI agents were?*

A. *I drove with one of the agents in one of their cars.*

Q. *They came over and picked you up at the spot where you dropped the truck off?*

A. *Yes.*

Q. *And did you then go back to the agent's room?*

A. *Yes.*

Q. *And while there, did the agents and you continue to discuss this matter as to how it would be handled?*

A. *Yes.*

Q. *And at their instigation, did you then make this approximately* 1:30 *telephone call that's been recorded out there to Mr. Wedelstedt?*

A. *Yes.*

Q. From the Ramada Inn?

A. Yes.

(T. p. 199)

Q. *And at this time, you told him you had the buyer, that*

he was willing to pay the $50,000.00 price; is that correct?

A. *Yes.*

Q. *Were you receiving instructions from the agents while you were talking to Mr. Wedelstedt?*

A. *Not while I was talking. Before I had made the calls, I did.*

Q. *And then you hung up and then called him back approximately an hour later, is that correct?*

A. *I think so.*

Q. *And during that time, did you talk to the agents again?*

A. *Yes.*

Q. *And during that time, did they give you additional instructions?*

A. *I don't recall any specific instructions, but I talked to them before I made each call.*

Q. *And the last recorded conversation that you made from Cedar Rapids to Mr. Wedelstedt is the first time that the Holiday Inn in Cedar Falls is mentioned, and the delivery should be made up there? Do you recollect that?*

A. *Yes, I think it's the first time.*

Q. And I assume that in this interim period of time, you

received instructions from the agents about telling him where they had to be delivered to, and where the deal would go down?

(T. p. 200)

A. They didn't want me to tell him, because I recall telling Mr. Wedelstedt I didn't know where they were at. "I don't know where they are staying. They got all the money and don't want me to know." I'm not sure when the last time was I told him about the Holiday Inn.

Q. *Well, do you remember this statement that you made on the phone to him:*

> *"I don't know yet — they told me — the guy told me that I'm supposed to go to the Holiday Inn, Cedar Falls, and when I got in and tell him my name or the assumed name and the ID that I got, that they'll direct me to the guy's room".*

Do you recognize that conversation now?

A. *Yes.*

Q. *Isn't that true, the first time that the Holiday Inn in Cedar Falls was mentioned?*

A. *Yes, I think so.*

Q. *That is the first time?*

A. *Yes.*

Q. *And isn't it true that you're mentioning that now because of instructions you received from the BCI as to how this whole matter was going to be set up and carried out?*

A. *Yes.*

Q. *And that is the last telephone conversation that you had between — that you had with Mr. Wedelstedt in*

(T. p. 201)

Las Vegas?

A. *Yes.*

Q. *And I take it the Cedar Falls location was the choice of the State Bureau of Criminal Investigation or their agents?*

A. *Yes.*

Q. *And at the time that you advised Mr. Wedelstedt of this Cedar Falls location, you already had the films in your possession or they were across the street in the truck?*

A. *Yes.*

Q. *Mr. Wedelstedt did not know where they were at that time?*

A. *That's correct.*

Q. *And the agent of the BCI had that truck under surveillance?*

A. *Yes.*

Q. *Was it at this time that you already had the truck that the agents told you to go ahead and tell Mr. Wedelstedt of the Cedar Falls location where the deal would go down?*

A. *Yes, I believe so.*

Q. *And the further conversations about the Cedar Falls location and the arrangements for the deal took place after Mr. Wedelstedt had already come back to Linn County?*

A. *Yes.*

Q. *And that's why that — in those conversations —*

(T. p. 202)

that took place where those films were in the truck and Mr. Wedelstedt didn't know where they were at, and whether the BCI agents were watching the truck, is that right?

A. *Yes.*

APPENDIX F

1. Excerpt from Exhibit "H" — Tape conversation between Defendant and Meade wherein Meade telephonically contacts Defendant in Las Vegas, Nev. from the Ramada Inn in Cedar Rapids, Sunday, December 15, 1974, at approximately 12:30 p.m.

Meade: You know, I'm interested in my seventy-five hundred first — that I've got coming to me. You know, it seems to me strange that it's taken eight weeks to even get a contract to show that I, that I have that coming, you know, so why should I wait and make money for you like I've been doing all along. I never got what I was supposed to get for the stuff in the first place. Now, why should I make money for you when I haven't got a fucking thing to show for it.

Defendant: (Unintelligible) . . . driving me nuts cause I don't give a fuck about that house — I haven't — matter of fact, made the fucking payments now cause I ain't got two thousand dollars to pay for it. You ain't going to get out of it. I don't know, really, I don't know what's going on. You don't trust me for seventy five hundred, like I say, forget the whole deal. Drop the deal. I make sure you get your seventy five. You sell the house (unintelligible) . . . Just tell them guys to "forget the deal."

Meade: My feelings—why should I tell the guy to forget the deal? I know, you know, the guy's here

with the money *and I got the film.* (Emphasis added.)

Defendant: *You don't know where that films at.* (Emphasis added.)

Meade: Huh? Who don't know where it's at? I got it. I've got it all. You better call Dale and check.

Defendant: I'll tell you what then Tom. You take the film. You take it all. You can have the whole fucking shooting pal. I don't want any part of it.

APPENDIX G

MOTION TO DISMISS

filed February 6, 1976

COUNT I

COMES NOW the defendant and after completion of the offer of evidence in support of the State's case moves to dismiss Count I of the Information on the following grounds:

* * *

3. The State's evidence shows as a matter of the law that Defendant was entrapped into the commission of Count I under the concept of "take back" entrapment as expressed in *State* v. *Overman*, 220 NW 2d 914 (Iowa 1975).

4. The State has failed to furnish any evidence that the informant Meade did not in fact supply the stolen property to Bruce Gentry for the purpose of redelivery of such property to other State agents or that said reappropriation of the property by State agents did not in fact take place. The State's case does not present a jury issue on these two factors.

5. Failure to dismiss Count I would violate Defendant's rights to "due process" under the federal and state constitutions in that:

(a) A conviction under Count I would be a conviction for a crime that originated with the state and was carried out by the state's implementation of the crime without which implementation the crime would not have taken place.

(b) Courts of law cannot sanction actions of government law enforcement agents which create crime for the purpose of convicting a person the agents induced to commit the crime.

(c) The conviction will have been obtained by the state creating the crime upon which the conviction rests.

COUNT II

COMES NOW the Defendant and after completion of the offer of evidence in support of the State's case moves to dismiss Count II of the Information on the following grounds:

* * *

5. The State's evidence shows as a matter of law that Defendant was entrapped into the commission of Count II under the concept of "take back" entrapment as expressed in *State* v. *Overman*, 220 NE 2d 914 (Iowa 1975) (See paragraph 3 in Count I hereof).

* * *

APPENDIX H

RENEWAL OF MOTION TO DISMISS AND RULING THEREIN:

(T. p. 339)

* * *

MR. FRERICHS: I want to have some record made, I renew all the motions made at the conclusion of the State's case to dismiss and also for a direct verdict at this time on all the grounds heretofore set forth.

THE COURT: Mr. Frerichs, your point is well taken. Prior to discussing the instructions I should have responded to your Motion to Dismiss. I apologize for that. I believe I informally indicated to you that I was going to overrule that in its entirety. I would like to do that at this time and I again would acknowledge your reoffering that particular motion at this particular time prior to commencement of argument.

MR. FRERICHS: I assume you are making the same ruling?

THE COURT: Yes, I stand on my ruling. Thank you, Mr. Frerichs.

In The

Supreme Court of the United States

October Term, 1978

No. 78-264

EDWARD JOSEPH WEDELSTEDT,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

CITATIONS CITED

CASES:

RULE:

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ARGUMENT

The State of Iowa respectfully submits Edward Joseph Wedelstedt's Petition for Certiorari should be denied for the following reasons:

I. The Petition Was Not Timely Filed.

Under Rule 22 of the Supreme Court Rules a petition for writ of certiorari to review a judgment of a state

court of last resort in a criminal case must be filed within 90 days after entry of judgment. Petitioner's request for rehearing to the Supreme Court of Iowa was denied May 17, 1978. His Petition for Certiorari to the Supreme Court of Iowa was filed on August 16, 1978; this is a date more than 90 days from the date the highest State court denied rehearing. Therefore the Respondent respectfully submits the Petition for Certiorari should be denied for failure to follow Rule 22 of the Rules of the Supreme Court of the United States. *U. S. ex rel. Coy v. United States,* 316 U. S. 342 (1942). But see, *Taglianetti v. United States,* 394 U. S. 316 (1969) (court has discretion to consider untimely filed petition).

II. No Federal Question is Presented.

The issue in the present case is narrow and unique to its facts, and no amount of rhetoric can convert it into one warranting review on certiorari. The issue presented is whether or not the state court's doctrine of "take back" entrapment was established as a matter of law thus requiring dismissal of the charges against Petitioner. The trial court and the Iowa Supreme Court found the State had produced evidence sufficient to create a fact issue as to whether or not the State, through its agent, supplied stolen films to the Petitioner and the case was accordingly found to be properly submitted to the jury. As noted by the Supreme Court, the "key question was witness Meade's capacity when he took the films from Petitioner's farmhouse to the Cedar Rapids motel to await Gentry and Leone as they flew in from St. Louis. Did Meade then have possession of the films as a BCI agent or did he have possession as [Petitioner's] agent. *State v. Wedelstedt,* 263 N. W. 2d 894, 900 (Iowa 1978).

> "Meade testified that he 'got' the location of the films when both a Mr. Karr and defendant told him to go there. Meade testified his belief the tape recording of the phone conversation would disclose this. (Transcript pp. 196-197). Defendant cannot rely on the tapes to withdraw this testimony. The tapes were at parts inaudible. Moreover the jury could believe Meade was right in his testimony but wrong in his stated belief the conversation was recorded on tape."

State v. Wedelstedt, 265 N. W. 2d 626, 627 (Iowa 1978). Petitioner's contention in reality is that the jury believed the wrong witness. Again, as noted by the Iowa Supreme Court, "It is elementary the jury is at liberty to take and reject from the testimony of various witnesses as it chooses." *State v. Wedelstedt, supra,* 265 N. W. 2d at 627. Their apparent attachment of greater credibility to Meade rather than Petitioner cannot be said to present an important question of constitutional law requiring review by this Court.

Furthermore, the facts in this case do not square with the *Overman* precedent on which Wedelstedt attempted to rely. Wedelstedt was not the victim of a full circle government scheme. Before Meade became involved in this case as a government agent, Wedelstedt had purchased and was in possession of the stolen films. This is not a situation where the State purchased the films from itself, through an intermediary (Wedelstedt) and then charged him with a crime. It is therefore apparent that the evil of the full circle transaction did not take place in the instant case and was therefore properly upheld. See, *United States v. Mahoney,* 355 F. Supp. 418 (E. D. La. 1973); *United States v. Chism,* 312 F. Supp. 1307 (C. D. Cal. 1970).

CONCLUSION

For the reasons detailed above, Respondent respectfully requests that, pursuant to this Court's supervisory power, this Petition be granted.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

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State Capitol
Des Moines, Iowa 50319

———o———

CERTIFICATE OF SERVICE

I, Ray Sullins, Special Assistant Attorney General for the State of Iowa, hereby certify that on the 13th day of October, 1978, I mailed three (3) copies of Brief for Respondent in Opposition, correct 1st class postage pre-paid to:

Arthur M. Schwartz, P.C.

1500 Western Federal Savings Building
Denver, Colorado 80202

I further certify that all parties required to be served have been served.

RAY SULLINS
Special Assistant Attorney General

State Capitol
Des Moines, Iowa 50319

IN THE

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PETITIONER'S REPLY MEMORANDUM

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CASE CITATIONS

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STATE OF IOWA
Respondent.

PETITIONER'S REPLY MEMORANDUM

In its Brief in Opposition to the Petition for Writ of Certiorari, the State of Iowa raises two issues: (1) that said Petition was not timely filed and (2) that no federal question is presented by the Petition. Neither objection should dissuade this Court from granting review of Petitioner's conviction.

As Respondent notes, the instant Petition was filed on August 16, 1978, some 91 days from the date on which the Iowa Supreme Court denied a rehearing. As Respondent also notes, an untimely filed Petition does not constitute a jurisdictional defect, *Taglianetti v. United States,* 394 U.S. 316, fn. 1(1969). In the *Taglianetti* case, this Court entertained a Petition for Certiorari filed 11 days out of time. This Court has, in numerous other cases, entertained such untimely filed petitions. In the case of *Smith v. Mississippi,* 373 U.S. 238 (1963), a Petition reached the Court one day late but had been mailed four days prior to the due date. Counsel for Petitioner filed a Motion that the Court consider the out-of-time Petition, but the Court granted the Petition without mentioning or acting on the motion. In *Fuller v. Alaska,* 393 U.S. 80 (1968), a Petition was filed by new counsel nearly a month after the expiration of the ninety-day period. No excuses or extenuating circumstances as to the tardiness were set forth. This Court, without mentioning the time problem, granted the Petition and ruled on the merits of the case.

In the instant matter, a Petition was prepared by recently obtained counsel, as in the *Fuller* case. Counsel for Petitioner mailed the Petition to this Court on August 14, 1978, by Express Mail. The Express Mail service involves a guarantee that the article mailed will arrive at the destination by 3:00 P.M. the following day — in this case, August 15, 1978, the 90th day of the time period. As such, counsel for Petitioner felt secure in his belief that the Petition would arrive within the 90 day period. Apparently, the Petition did not arrive on August 15, 1978, or arrived on that date and

was not docketed until the following date. In either case, as in the *Smith* opinion, the docketing of this Petition on August 16 should not prevent this Court from reviewing the Petition on its merits.

Respondent's second claim that no federal question is presented by the Petition is contrary to the very cases cited in the Petition, cases which Respondent does not discuss or distinguish. In the cases of *Thompson v. City of Louisville,* 362 U.S. 199 (1960) and *Vachon v. New Hampshire,* 414 U.S. 478 (1974), this Court reviewed and reversed state court convictions which were based on insubstantial evidence. This Court had no difficulty in finding that such convictions violated Defendant's Fourteenth Amendment due process rights. Further, the several cases which Petitioner cited involving review by this Court of entrapment issues also concerned a review by this Court of the factual basis for lower court decisions. In the entrapment cases, this Court had also delineated in finding the existence of a substantial federal question.

Respondent's attempted distinction of the *Overmann* case is negated by the very opinion which Respondent seeks to uphold. In its opinion in the instant case, the Iowa Supreme Court did not, as Respondent now contends, hold that the *Overmann* precedent was inapplicable to the facts below. Rather, the court held that the informer never possessed the stolen property solely as a government agent. Pursuant to the *Overmann* opinion, where contraband is supplied by the government to the Defendant and later reappropriated from the Defendant, take back entrapment is shown. As such, the evidence at trial created take back entrapment, and the state failed to present facts sufficient to refute such entrapment. For these reasons, the very doctrine of the Iowa Supreme Court required that Petitioner's conviction be overturned. The failure of that court to do so violated Petitioner's Fourteenth Amendment right to due process of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 1978, I mailed three (3) copies of the Petitioner's Reply Memorandum, by placing same in the United States Mail, postage prepaid, addressed to:

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